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No. 425

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF DALLAS, TEXAS,
Petitioner,

v.

TUBBS MANUFACTURING COMPANY, INC., AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR REHEARING AFTER DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 3, 1957.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-8711

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner City of Dallas respectfully prays for a rehearing and reversal of the order heretofore entered on the 12th day of November, 1957, denying its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, on the following grounds:

1.

The lien of the Petitioner is a true, general, perfected, choate lien for all city taxes, adheres to the property not-

withstanding its transfer, requires no recording, adheres to all of the property of the taxpayer so that it is unnecessary to identify the specific property although specific property is assessed, arises by operation of law as of January 1 of each year in question, the amount thereof is certain and ascertainable and can be obtained by any person by inquiry at the office of the City Tax Collector, whereas the priority asserted under R. S. 3466, or lien if perfected, does not operate against any specific property and is being asserted against innocent purchasers without notice so that no person dealing with taxpayer's property has an opportunity to find out if the government has any claim against the taxpayer until such time as the government either asserts its priority in some legal proceedings, or records its lien, and has no reference to point of time when liability for the government tax accrues and for that reason petitioner's lien under the facts should be recognized as being ahead of any priority asserted by the government and also ahead of the government's lien which is admittedly junior in point of time.

2.

Since the purpose of the Federal Lien Statute and the State Lien Statute is the same, i. e., the securing of better tax collection in the enactment of which each sovereign acts within its orbit of taxation, the position of the government that it is not bound by any state statute creating a lien to

secure the collection of the taxes for itself and its political subdivisions in effect amounts to a denial to the state of its power to assess, levy and collect taxes to support its state government and political subdivisions, in violation of the Fifth Amendment of the Constitution, and clause 4, Section 8 of Article I of the Constitution, which requires that Bankruptcy laws shall be uniform.

3.

The U. S. Rev. Stat. 3466 was originally enacted on the 3rd day of March 1797, and the first uniform bankruptcy act was passed by Congress on July 1, 1898, and thereafter modified from time to time, and although the Supreme Court in the case of *U. S. v. Emory, 314 U. S. 423*, held that the Bankruptcy Act did not supersede this statute, yet the two acts are incompatible because in *Rankin v. Scott, 12 Wheat, 177, 6 L. Ed. 592*, the Court held that the Insolvency Statute gave the government priority only on that part of the estate not incumbered by private liens, and since admittedly the United States has a junior lien in point of time, it cannot, under the Insolvency Statute, Article 3466, override and destroy the true, specific choate lien of the petitioner.

4.

This rehearing should be granted for the reason that this Court has granted writs of certiorari in similar cases which are now pending on the Docket of this Court and the decisions in those cases will vitally affect the rights of the Petitioner.

CONCLUSION

This Motion for Rehearing should be granted and the Order denying the Petition for Writ of Certiorari should be reversed and the Writ granted.

Respectfully submitted,

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December 3, 1957

I hereby certify that the above Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to the grounds above specified.

Dated December 3, 1957.

/s/ Kucera
Attorney for Petitioner.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

1. The Fifth Circuit Court of Appeals has on three previous occasions construed the Charter of the City of Dallas and determined the nature and character of the lien of Petitioner, City of Dallas:

In the case of *In Re Brannon, 61 F. 2d 959 (Cert. Denied), 289 U. S. 742 (Jan. 1933)*, the Court construed Section 194 of the Charter of the City of Dallas, which provides:

> "A lien is hereby created on all property, personal and real, in favor of the City of Dallas for all taxes, ad valorem, occupation or otherwise. Said lien shall exist from January 1st in each year until all the taxes are paid. Such lien shall be prior to all other claims and no gift, sale, assignment or transfer of any kind or judicial writ of any kind can ever defeat such lien."

The Court in arriving at its holding that the City has a true, perfected general choate lien used the following language:

> "* * * We think a true general lien for all city taxes is given the City of Dallas by the language last quoted, which adheres to the property notwithstanding its transfer and which, requiring no record, is good as a lien in bankruptcy. All property of the taxpayer falls under it, so that it is unnecessary to identify that assessed for the particular tax.
>
> * * * * *
>
> "We therefore think that the taxes due the City of Dallas have a first and general lien and must be first satisfied."

In *City of Dallas v. Crippen, 171 F. 2d 526 (Cert. Denied), 336 U. S. 937 (Dec. 1948)*, the Court again construed the same charter provision of the City of Dallas and reiterated and affirmed the holding in the *Brannon* case, supra, in the following language:

> "Our conclusion is that Section 194 of the Dallas charter fixes a lien on personal property actually within the City on the specific date; and that the City has such a lien for its taxes, which was preserved in bankruptcy, but that the payment of the claim therefor is required to be postponed until payment of the debts specified in clauses (1) and (2) of subdivision a of Section 104 of Title XI of the United States Code Annotated. See Section 107, subs. b and c of said Title. In determining the order of distribution between the City of Dallas and the United States, a careful distinction must be made between tax liens and tax priorities. It is well settled that claims for taxes secured by valid liens, like other valid liens, must be satisfied out of the bankrupt's estate before any distribution at all begins under Section 64, subject, however, to an express statutory exception inserted by the 1938 Act in Section 67, sub. c[3] which provides for postponement in payment of tax liens in certain circumstances."

In *Brans v. City of Dallas, 217 F. 2d 640 (Dec. 1954)* the Circuit Court again reviewed the same charter provision and held as follows:

> "Under settled law the City had a tax lien on the properties, from the sale of which the funds in the trustees' hands were derived and, to the extent necessary to discharge debts secured by the lien, the proceeds of the sale of the property were withdrawn from or taken out of the assets of the estate."

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[3] 11 U. S. C. A., Section 107, Sub. c.

Thus over a period of 20 years on three different occasions the Fifth Circuit has originally determined and reaffirmed the nature and character of the lien of the City of Dallas to be a choate perfected lien.

The Texas courts have construed this same charter provision to the same effect in the cases of *Texas Employers' Insurance Association v. City of Dallas, 5 S. W. 2d 614* and *Urbish v. City of Dallas, 260 S. W. 2d 148.*

The Circuit Court in the *Brannon* case approved the Texas Court decision in *Kirk v. City of Gorman, 283 S. W. 188*, where the Court construed a Texas statute giving cities of certain class a prior and superior lien on personal property to secure its taxes. The Court used the following language:

> "It is competent for the legislature to make taxes against property superior to the lien upon said property created prior to the assessment of the tax."

The lien of the City of Dallas as stated in the *Brannon* case was a true, general, perfected, choate lien and needed no further action or resort to court in the way of distraint, recordation or otherwise. The lien arose by operation of law as of January 1st and attached to the specific property assessed of the insolvent taxpayer. A choate lien was created which U. S. Rev. Stat., Art. 3466 did not displace. Such a lien is definitely recognized in the case of *U. S. v. City of New Britain, 347 U. S. 81*, and at page 86 the Court said:

> "In the instant case, certain of the City's tax and water rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens."

The Fifth Circuit Court of Appeals followed the decision in the *New Britain* case to the letter in the case of *U. S. v. Atlantic Municipal Corporation, 212 F. 2d 709.*

No reason presents itself why the Circuit Court refused to follow these two decisions and apply them to the facts in this case.

In the trial court the Government asserted its claimed priority under Art. 3466 although it had a junior lien in point of time and did not insist upon its lien superseding that of the Petitioner and the private lienholders. In the Circuit Court, the United States contended for priority under R. S. 3466 over the lien of the City and private liens, which the Court rejected insofar as the private lienholders are concerned and by the method of circuity arrived at the conclusion that the lien of the City of Dallas attached to the property covered by the individual mortgages and therefore the city came ahead of the private lienholders. Thus the court recognized the true nature of Petitioner's lien by requiring the private lienholders to pay the taxes and yet it rejected the character of the lien when it considered the United States taxes. It is difficult to see any reason for the application of any rule of circuity in this case in view of the previous holdings of the Circuit Court in the *Brannon, Crippen* and *Braus* cases, supra, because the rule in the *New Britain* case should have been applied to the facts of this case.

The decisions of the United States Supreme Court in the cases of *U. S. v. Gilbert Associates, 345 U. S. 361; Illinois*

v. Campbell, 329 U. S. 362; U. S. v. Waddill Co., 323 U. S. 353; U. S. v. Texas, 314 U. S. 480; New York v. Maclay, 288 U. S. 290; Spokane County v. U. S. 279 U. S. 80 and others do not apply because in each of these cases it was determined that the asserted lien was not choate and therefore R. S. 3466 was applied.

2. The asserted claim of the Government that the states are powerless to enact legislation creating liens, specific, choate and perfected, against specific property, both real and personal, to secure the collection of its taxes, is tantamount to denial to the states of the full exercise of the power of taxation over subjects within their legitimate scope. If the Congress can override these state statutes, then such enactments are violative of the due process clause of the Constitution in that they deny to the state the rights of sovereignity and amount to take the property without due process of law. If the Congress has the authority to enact a priority law to displace any perfected, choate lien to secure the collection of state taxes and those of its political subdivisions, then it has likewise the power to enact legislation which would nullify any liens for bona fide loans or purchase price of property by private persons and lending agencies with the result that no individual or lending agency could afford to loan any money on a business to a taxpayer without underwriting the taxes that the Federal Government may impose a long time after the private business transaction or loan had been consummated. If the Congress has the right to override any statutory liens of states and their political subdivisions to

secure the collection of their taxes in insolvency and bankruptcy cases, then it likewise has the authority to prohibit states from enacting legislation creating liens to secure the collection of taxes from non-insolvent taxpayers and persons not declared bankrupt, and thus render the collection of taxes by the states impotent.

Furthermore, the attempt under R. S. 3466 to override all statutory liens of the state and its political subdivisions to secure collection of its taxes, we believe, is a direct interference with the state sovereignty. In *Ashton v. Cameron County Water Improvement District, 298 U. S. 513*, the Court struck down a part of the bankruptcy statute which Congress enacted, with the consent of the States, which permitted a public corporation to be declared bankrupt. In that case the Court said:

> "The difficulties arising out of our dual form of government, and the opportunities for differing opinions concerning the relative rights of state and national governments are many; but for a very long time this court has steadfastly adhered to the doctrine that the taxing power of Congress does not extend to the states or their political subdivisions. The same basic reasoning which leads to that conclusion, we think, requires that limitation upon the power which springs from the bankruptcy clause. U. S. v. Butler, 297 U. S. 1."

To paraphrase this language the Government's claim that the Congress by the enactment of R. S. 3466 has the power to destroy the liens and method of collections of its taxes by the state and local political subdivisions is tantamount to disabling or abridging the rights of the state to collect its taxes in violation of the Fifth Amendment of the

Constitution and also contrary to Clause 4, Section 8 of Article I of the Constitution relating to the Uniform Bankruptcy laws.

3. The Government takes the position that in insolvency cases under R. S. 3466 that the Congress has the power to override liens of the State and its political subdivisions and private liens. Title 11, Section 104(4) formerly Section 64 of the Bankruptcy Act which provides:

> "(4) Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof"

has reference to taxes unsecured by liens.

Under Title 11, Section 107, Subdivision (b) in part it is provided:

> "• • • Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy; they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

From the foregoing it appears that in insolvency proceedings the Government is trying to assert its priority over liens, both private and public under R. S. 3466 and in bankruptcy proceedings it asserts priority of lien if it has a lien senior to all other liens, private or public, under Sections 107, subdivision (b) of the bankkruptcy act. If it has no lien then it is relegated to Section 104, subdivision a(4) to a priority on an equal basis with the state and its po-

litical subdivisions. The Supreme Court has declared that the terms "insolvency" and "bankruptcy" are convertible and mean the same thing. *Sturges v. Crowninshield, 4 Wheat. 122; Hanover National Bank v. Moyses, 186 U. S. 181; Continental Illinois National Bank and T. Co. v. Chicago RI&P Railroad Co., 294 U. S. 648.* Since insolvency and bankruptcy mean the same, does it not follow that this kind of legislation is repugnant to Clause 4, Section 8 of Article I of the Constitution which provides "that the Congress shall have power * * * to establish * * * uniform laws on the subject of Bankruptcy throughout the United States?"

4. This motion for rehearing should be granted and the writ granted for the further reason there are now pending on the docket of this Court *Nos. 97, U. S. v. R. F. Ball Construction Co.; 503, U. S. v. Boyd; 311, Commissioners v. Stern; 395, U. S. v. Bess; 410, Bess v. United States;* and *516, Latrobe Construction Co. v. United States.* In all of these cases the Government is seeking to sweep or set aside the effect of those decisions and destroy private liens or claims by the application of R. S. 3466. Although the United States did not seek a rehearing in this case yet it now asserts that the only question involved in the construction of R. S. 3466 as against the tax claim of the Petition. The brief resisting the granting of the Writ of Certiorari in this case filed by the United States Government does not state the nature of the line which the Petitioner asserts although the Circuit Court in the *Brannon, Crippen* and *Brans* cases, supra, has determined the nature of that

lien and this Court has denied Writ of Certiorari in the *Brannon* and *Crippen* cases and thereby Petitioner assumes that in denying these writs this Court had approved those decisions.

On the other hand, the United States Government has not seen fit so far to review the case of *U. S. v. Flood*, 247 F. 2d 209, in which the First Circuit Court of Appeals held that a Maritime lien is superior to a Federal tax lien on the ground that a Maritime lien is specific whereas the Federal tax lien is general and inchoate. The Government there seems to recognize the validity of a Maritime lien in the hands of a private holder, yet in the instant case it is reluctant to recognize the lien of the Petitioner, the nature and character of which had been previously adjudicated.

CONCLUSION

This Motion for Rehearing should be granted and the Order denying the Petition for Writ of Certiorari should be reversed and the Writ granted, because:

(1) The Petitioner has, on authority of adjudicated cases, a true, perfected, choate lien;

(2) The Government's claim of priority under R. S. 3466 which would have the effect of overriding statutory liens enacted by the states for the benefit of the states and their political subdivisions, would be violative of the Fifth Amendment of the Constitution, and also violative of Clause 4, Section 8 of Article I of the Constitution requiring uniform Bankruptcy laws; and

(3) Since the terms "bankruptcy" and "insolvency" are legally interchangeable and mean the same thing, the two statutes are incompatible, in that Congress intended to provide a rule for the collection of taxes by the Government where not supported by a lien, on the same basis as the state and its political subdivisions and where liens exist that they take in order in point of time.

Respectfully submitted,

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